No. 88-7

# In the Supreme Court of the United States

**October Term, 1988**

WEST PENN POWER COMPANY, a corporation,
*Defendant-Petitioner,*

v.

JOHN H. ENGLE, WILLIAM R. ENGLE, WILLIAM C. ENGLE, t/d/b/a ENGLE's HOLIDAY HARBOR, A Partnership and as Representative of a Class,
*Plaintiffs-Respondents.*

## REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPERIOR COURT

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## REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPERIOR COURT

The Brief in Opposition to Petition for Writ of Certiorari to the Pennsylvania Superior Court filed by Respondents (hereinafter "plaintiffs") highlights the need for review by this Court of the nationally important question presented in the Petition. Additionally, since the filing of the Petition, the trial court has certified this instant litigation as a class action which significantly broadens the direct applicability of this case. The description of the certified class (described hereinafter) presents a limitless number of questions affecting the design, construction, operation, and maintenance of federally licensed hydro-electric dams and the national policies affecting the nation's water resources and navigable waterways. A copy of the Opinion and Order of the trial court dated October 3, 1988 issued by the Court of Common Pleas of Washington County, Pennsylvania, which has not been reported officially, appears in Appendix A to this Reply Brief. By Order dated October 27, 1988, which Order has not been reported officially and which appears in Appendix B to this Reply Brief, the trial court made certain modifications to the October 3, 1988 Order.

### PARTIES TO CASE

In response to plaintiffs' motion to certify a class, the Court of Common Pleas of Washington County, Pennsylvania, certified a class described as follows:

> All individuals or entities who suffered property damages in Pennsylvania between November 3 and November 6, 1985, as a result of the actions of West Penn Power Company, in obstructing and/or releasing

improperly flood waters from the Lake Lynn Dam and/or failing to adequately notify such individuals or entities.[1]

## ARGUMENT

### I. The Issue is Exclusive Jurisdiction Not Pre-emption

As explained at page 15 of the Petition, the issue herein is not pre-emption. Nevertheless, plaintiffs distort West Penn Power Company's position in the "Question Presented for Review" by the plaintiffs. The question is not whether Section 317 of the Federal Power Act, 16 U.S.C. §825p, pre-empts state law tort claims in their entirety, but whether Section 317 requires that such claims be litigated exclusively in a federal district court.

Pre-emption and exclusivity of jurisdiction are two distinct concepts (as plaintiffs expressly recognize at page 7 of their Brief in Opposition); the instant litigation is not a pre-emption case. Pre-emption relates to *what* law applies, while exclusivity of jurisdiction relates to *where* the case is to be tried. Plaintiffs attempt to confuse the issue by arguing that state law tort claims cannot be tried in federal district courts. Contrary to the statement at the bottom of page 7 of the Brief in Opposition, the diversity of jurisdiction provisions of the United States Code provide an example of cases in which state law tort claims must be tried in the federal district courts.

Plaintiffs state on page 6 of the Brief in Opposition that:

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[1]The trial court changed the wording of the class description from "business entities" to "entities" in its Order of October 27, 1988.

> Defendant West Penn Power Company's position is confusing and internally contradictory. While apparently arguing for "exclusivity" or pre-emption, West Penn Power Company concedes that the Federal Power Act does not pre-empt state law tort actions.

The foregoing is a blatant misstatement of West Penn Power Company's position. West Penn Power Company has never argued for " 'exclusivity' or pre-emption." As pointed out above, the two concepts are entirely different. Furthermore, West Penn Power Company has never made any concession contrary to its assertion that under the Federal Power Act state law tort claims must be brought exclusively in the federal district courts. The issue is not whether the Federal Power Act pre-empts actions for state law tort claims, but whether the Federal Power Act requires that state tort law claims be brought exclusively in the federal district courts.

West Penn Power Company has never contended that state law tort claims could not be litigated in the federal district courts. Plaintiffs apparently believe that exclusive jurisdiction in the federal district courts "pre-empts" their state law tort claims. That is not, and never has been, West Penn Power Company's position.

Thus, plaintiffs' arguments directed to pre-emption contained in pages 6-13 of the Brief in Opposition are not directed to the proper issue.

**II. Schneidewind v. ANR Pipeline Company and Not Pan American Petroleum Corp. v. Superior Court of Delaware is Controlling**

*Pan American Petroleum Corp. v. Superior Court of Delaware*, 366 U.S. 656, 81 S.Ct. 1303, 6 L.Ed.2d 584 (1961), is distinguishable because it is a contract case

which is governed by the agreement entered into by the parties. The focus of the controversy was on the rights expressed in the contract, not on the rights and duties established by the Federal Energy Regulatory Commission ("FERC") pursuant to its licensing procedures for the design, construction, maintenance, and operation of a hydro-electric facility.

Here plaintiffs' case is brought in negligence and absolute liability, not in contract. Plaintiffs' reliance on *Pan American* and the other cases in Section III of their Brief in Opposition is flawed because private contractual arrangements do not affect design, construction, maintenance and operation of a hydro-electric dam controlled by a license issued by the FERC. In all of the cases cited by plaintiffs in Section III, the primary relief sought is asserted in terms of traditional contract rights which do not affect FERC. Here, however, the tort claims made by plaintiffs attack FERC's licensing procedures and thus, FERC's dominion or control over water resources and navigable waterways.

The nature of the liability alleged by plaintiffs has been clearly focused by the trial court in its Order of October 3, 1988 (App. A to Reply Brief). In that Order, the trial court identifies three issues to be decided:

> 1. Whether the defendant, West Penn Power Company, during November 1985 was negligent in obstructing and or releasing improperly flood waters from the Lake Lynn Dam during November 3-6, 1985 and/or in failing to adequately notify the individuals or entities who suffered property damages.
>
> 2. Whether the negligent actions, if any, of the West Penn Power Company during the aforesaid period was a proximate cause of property damages suffered by the plaintiffs.

3. Whether the maintenance and operation of the hydro-electric project known as the Lake Lynn Dam, by its defendant West Penn Power Company, was an abnormally dangerous activity of the defendant, and whether the maintenance of such alleged dangerous instrumentality by the defendant Power Company was a proximate cause of any harm to the plaintiffs.

The foregoing issues are clearly controlled by the federal license issued by FERC (App. A to Petition) to West Penn Power Company and FERC Regulations governing federally licensed hydro-electric facilities. A uniform scheme of enforcement is critical to the preservation and control of this country's water resources and navigable waterways. This avoids having a licensee such as West Penn Power Company operate its dam in accordance with the kaleidoscopic variations of a multitude of local court decisions. This is only achieved through the Congressionally mandated exclusive jurisdiction requirement of the Federal Power Act, 16 U.S.C. §825p. The federal courts are not likely to have a parochial view of circumstances such as those involved in the case at bar.

Although *Schneidewind v. ANR Pipeline Company*, U.S. , 108 S. Ct. 1145, 99 L.E. 2d 316 (1988) is not an exclusivity of jurisdiction case, it clearly provides the basis for the decision in this case. As in the Natural Gas Act, 15 U.S.C. §717, *et seq.*, the Federal Power Act gives FERC substantial powers and obligations. Some of those powers require FERC to regulate and control the design, construction, maintenance and manner of operating a licensed hydro-electric facility to develop this nation's water resources. According to *Schneidewind*, attempting to infringe on the decisions of FERC may create a conflict with those decisions. Here, plaintiffs, by challenging West

Penn Power Company's federally approved design, construction, operation and maintenance of the dam, bring this case squarely within the Federal Power Act, 16 U.S.C. §803(c) and 16 U.S.C. §825p and require that the case be brought only in the federal district court.

### III. South Carolina Public Authority v. FERC is Consistent with Petitioner's Position

The question before the court in *South Carolina Public Service Authority v. FERC*, 850 F.2d 788 (D.C. Cir. 1988), was not exclusivity of jurisdiction, but was whether FERC exceeded its authority when it conditioned the renewal of a license upon acceptance of strict liability for property damages caused by an earthquake-induced flood. The court held that FERC exceeded its authority when it attempted to replace state tort law with its own system of compensation. This is consistent with West Penn Power Company's position. Federal courts can and do adjudicate state law claims. Such is the system devised in the Federal Power Act and which is applicable here. No contention is made that state tort law is displaced, only that the federal courts must apply the state tort law.

## CONCLUSION

For the foregoing reasons and the reasons set forth in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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## APPENDIX A

## IN THE COURT OF COMMON PLEAS OF WASHINGTON COUNTY, PENNSYLVANIA

## CIVIL DIVISION

JOHN H. ENGLE, WILLIAM R. ENGLE, WILLIAM C. ENGLE, t/d/b/a ENGLE'S HOLIDAY HARBOR, A partnership and as Representative of a Class,
*Plaintiffs,*

v.

WEST PENN POWER COMPANY, a corporation,
*Defendant*

**No. 271 November Term, 1985 A.D.**

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## OPINION and ORDER OF THE COURT

Rodgers, J.
October 3, 1988.

In November, 1985 the plaintiffs filed a class action complaint against the defendant, West Penn Power Company, in the Court of Common Pleas of this county, seeking recovery for property damage caused by the release of waters from the Lake Lynn hydro-electric dam on the Cheat River in West Virginia operated by the defendant in early November 1985.

The plaintiffs' complaint stated common law causes of action based upon negligent release without notice of waters from the dam, and the alleged operation by the defendant power company of an abnormally dangerous instrumentality.

From the outset the defendant has taken the position that this court is without jurisdiction because exclusive jurisdiction rests with the federal district court. After removal, Judge Bloch of the United States District Court for the Western District of Pennsylvania remanded the action to this court on August 13, 1986. This court overruled defendant's Preliminary Objections to jurisdiction, but certified its order to a controlling question of law to the Superior Court of Pennsylvania on June 12, 1986. On August 25, 1987, the Superior Court confirmed the jurisdiction of this court. The Supreme Court of Pennsylvania denied the defendants' petition for allowance of appeal on April 11, 1988. Defendant, on July 1, 1988 filed a petition for Writ of Certiorari to the United States Supreme Court which apparently is still pending.

On February 2, 1988, the plaintiffs petitioned for Certification of Class Action, and this court has conducted hearings on the motion for class certification on April 11, 1988, April 19, 1988 and May 19, 1988. Extensive discovery has been conducted. The court has directed the parties to submit pretrial statements in this matter by November 15, 1988, and that a pretrial conference be held on November 22, 1988. Defendant has also filed motions for summary judgment and judgment on the pleadings which the court will also hear on November 22, 1988.

After consideration of the extensive briefs and arguments of counsel, this court will grant the plaintiff's motion for class certification limited to particular issues, subject, however, to revocation, alteration or amendment for cause shown before a decision on the merits.

After consideration of all relevant testimony, depositions, admissions and other evidence, this court makes the following findings:

Between November 3 and November 6, 1985 a flood of record proportions occurred in the Monongahela River Basin in northern West Virginia and southwestern Pennsylvania, doing extensive damage to numerous homes and businesses.

The Monongahela River Basin is composed of three river basins, the Tygart River Basin, the West Fork River Basin and the Cheat River Basin. The Tygart River and West Fork join at Fairmont, West Virginia to form the Monongahela River. The Cheat River and Monongahela River join at Point Marion on the boundary between Greene and Fayette Counties in western Pennsylvania, and near the boundary of northern West Virginia.

At the time of this flood, the defendant, West Penn Power Company, operated a project known as the Lake Lynn hydro development, located on the Cheat River about three miles upstream from Point Marion. The Lake Lynn Dam has been duly licensed by the Federal Power Commission, now the Federal Energy Regulatory Commission. It was constructed for the generation of electricity and not for flood control, but defendant's license does require that it not release from the Lake Lynn Reservoir during flood periods, flows that would exceed those which would have occurred in the absence of the project.

The heaviest rainfall during this period fell in the Cheat River Basin which, unlike the Tygart River Basin, lacks flood control facilities.

At the height of the flood about November 5, 1985, the power house and other facilities of the defendant at Lake Lynn began to flood and the employees were compelled to leave their post for a time.

The plaintiffs, the Engles, who own a marina, with boats and boating facilities at the confluence of Ten Mile Creek and the Monongahela river, where the Monongahela River enters Washington County flowing northward, on behalf of themselves and other residents and entities of Pennsylvania, in Washington, Greene, Fayette and Allegheny Counties, claim in this suit that the defendant power company did not make adequate plans for handling the flood waters of the Cheat River, which they knew had to pass through Lake Lynn, and that without notice to them, the defendant released large quantities of water at improper times and in improper amounts substantially contributing to the damages which they have suffered.

The defendant power company denies any such negligence and has presented expert testimony that, in fact, its operation of the Lake Lynn facility reduced what would have been the natural flood crest by at least four feet. The plaintiffs' expert, Mr. Cahill, has expressed a preliminary opinion that the defendant's actions may have substantially contributed to the damages suffered by the plaintiffs but, was unable, at the hearings on Class Certification to give a definitive opinion. However, discovery still continues and the plaintiffs have been directed to include their experts' reports in their pre-trial statement to be filed on or before November 1, 1988.

Plaintiffs have presented evidence that, at the time of hearing, the purported class included about 133 property owners in Washington County, including 48 in the town of Millsboro, 34 in Fredericktown and 12 in Clarksville; 19 in Greene County, including 11 in Greensboro and 5 in Point Marion; 3 in Fayette City and 5 in Dravosburg in Allegheny County.

The plaintiffs have also presented evidence that the 133 purported class members in Washington County have damages estimated to be in excess of $7,000,000.00 with individual claims ranging from under $10,000.00 to over $1,000,000.00.

The defendant has presented evidence that at least 3 individual cases have been filed in Washington County involving about 90 plaintiffs, with total damages claimed to be in excess of $500,000.00 and another with 3 plaintiffs claiming damages in excess of $10,000.00. An individual action is also filed against West Penn by Green Cove, et al., in this court and the United States District Court for the Western District of Pennsylvania. One of the other cases in this county involves 9 plaintiffs, each with a claim under

$10,000.00 which has been assigned to an arbitration docket; 2 cases have been filed in Westmoreland County involving 35 and 9 plaintiffs respectively.

Initially the plaintiffs sought certification of a class to be described as follows:

> All individuals or business entities who suffered property damage as a result of the actions of West Penn Power Company during November 1985 in obstructing and/or releasing improperly flood waters from the Lake Lynn Dam and/or failing to adequately notify the residents of Washington County, Pennsylvania.

Subsequently plaintiffs filed an Amended Motion for Class Certification after the hearings held in this matter as follows:

> All individuals or business entities who suffered property damage in the geographical area from Point Marion, Pennsylvania, to Maxwell, Pennsylvania, from November 3-6, 1985, as a result of the actions of West Penn Power Company in obstructing and/or releasing improperly flood waters from the Lake Lynn Dam and/or failing to adequately notify the residents of Washington County, Pennsylvania.

The class to be certified, of course, rests within the sound discretion of the court, Pa.R.C.P. 1710.

Pa.R.C.P. 1702 says this:

> One or more members of a class may sue or be sued as representative parties on behalf of all members in a class action only if
>
> (1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;

(4) the representative parties will fairly and adequately assert and protect the interests of the class under the criteria set forth in Rule 1709; and

(5) a class action provides a fair and efficient method for adjudication of the controversy under the criteria set forth in Rule 1708.

The criteria for certification in determining whether the class action is a fair and efficient method of judication are set forth in detail in Pa.R.C.P. 1708. Preliminarily, however, this court must consider the claim of the defendant, that no class can be certified in the absence of any evidence that it was negligent or that such negligence was a proximate cause of plantiffs' harm. The defendants purport to rely on Allegheny County Housing Authority v. Berry, 338 Pa. Super. 338, 487 A.2d 995 (1985). However, Pa.R.C.P. 1707 (c) says "The hearing shall be limited to the Class Action Allegations". In Berry, the Superior Court points out, the tenants did not show that their claims against the landlord of uninhabitability involved a common question of fact as required by Pa. R.C.P. 1702.

Similarly the defendant relies upon Cook v. Highland Water and Sewer Authority, 108 Pa. Commw. 222, 530 A.2d 499 (1987), where again the court found there was no common question of fact.

This court has found helpful the opinions of Judge Weinstein, in re "Agent Orange" Product Liability Litigation, particularly, 100 F.R.D. 718 at 722 et. seq. (1983); the "Agent Orange" litigation eventually involved about

240,000 claimants who brought suit against manufacturers of various herbicides containing dioxin, as well as the federal government. Even though there were numerous other issues, Judge Weinstein certified a class action as to the manufacturers, on the grounds that there was a common question of general causation and a common question of the applicability of the "military contract" defense; that these common questions predominated over any question affecting only individual members, since a favorable decision for the defendants on these issues would end the litigation in their favor, and a favorable decision on behalf of the plaintiffs would remove these issues which would otherwise consume an enormous amount of time in further litigation.

Judge Weinstein further discusses the class action aspects of the "Agent Orange" litigation in 597 F. Supp. 740 at 755 et seq. (1984). He pointed out, 597 F. Supp. at 782, that "since no motion for summary judgment based on inability to demonstrate causation was made, the exact evidence plaintiffs were relying upon to satisfy the burden of proof on the issue was never fully set forth." A settlement of $180,000,000.00 in the class action was, therefore, approved even in the absence of evidence of any proximate cause.

The weakness of the plaintiffs' claim of causation is further emphasized by Judge Weinstein's decision, in another aspect of the "Agent Orange" litigation, 611 F. Supp. 1223, (1985), where he granted the motion of defendant chemical companies for summary judgment against the Vietnam veterans and members of their families, who had opted out of the class previously certified, on the ground that plaintiffs had failed to provide evidence of causation, among other reasons.

The settlement of the "Agent Orange" product liability litigation was affirmed by the Circuit Court of Appeals, 818 F. 2d 145 (1987), concluding that the action was properly certified as a class action on the basis of the centrality of the question of the military contractor defense.

In the case at bar, the putative class members are claiming property damages rather than personal injury, and the difficult question of medical causation is not present.

Nevertheless, the defendant contends that the proximate cause is individual to each plaintiff, depending upon the location of the plaintiffs' property above the natural flood crest. Moreover, this defendant has presented expert testimony that, its actions reduced the natural flood crest and, therefore, could not be a proximate cause of injury to any of the purported class members. If a jury were so persuaded on the merits this litigation would then end in favor of the defendant.

But the defendant concedes at this stage, it is possible, that the plaintiffs may later present evidence that the natural flood crest was increased by the action or inaction of the defendant. However the defendant claims that Mr. Engle, may have been damaged by the natural flood crest, while class members, whose property was at a higher elevation, escaped damage.

The Restatement, Torts 2nd §432, says this

> (1) Except as stated in Subsection (2), the actor's negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent.
>
> (2) If two forces are actively operating, one because of the actor's negligence, the other not because of any

misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor's negligence may be found to be a substantial factor in bringing it about.

Illustrations:

1. A statute requires all vessels plying on the Great Lakes to provide lifeboats. One of the A Steamship Company's boats is sent out of port without any such lifeboat. B, a sailor, falls overboard in a storm so heavy that had there been a lifeboat it could not have been launched in the sea then running. B is drowned. The A Company's failure to provide lifeboats is not a cause of B's death.

2. A dams a stream running through his own land. The dam is negligently constructed in that it is not sufficiently strong to confine the water from the freshets which occur from time to time in the spring. A sudden cloudburst of unprecedented severity sweeps the dam away, causing the water collected by it to overflow the land of B. The flood caused by the cloudburst is so great that it would have burst the dam even had it been properly constructed. A's negligent construction of the dam is not a cause of the inundation of B's land.

3. Two fires are negligently set by separate acts of the A and B Railway Companies in forest country during a dry season. The two fires coalesce before setting fire to C's timber land and house. The normal spread of either fire would have been sufficient to burn the house and timber. C barely escapes from his house, suffering burns while so doing. It may be found that the negligence of either the A or the B Company or of both is a substantial factor in bringing about C's harm.

> 4. The same facts as in Illustration 3, except that the one fire is set by the negligence of the A Company and the other is set by a stroke of lightning or its origin is unknown. It may be found that the negligence of the A Company is a substantial factor in bringing about C's harm.

The defendant's argument improperly utilizes the costs-benefits approach used in evaluating whether the construction of a flood control dam is economically justified, to determine legal or proximate cause. But, assuming that the defendant's negligence allowed an increased volume of water to be added to the natural flood crest, the increased volume created by the defendant's negligence, would not flow as a separate layer over the "natural flood crest", but the natural crest and the waters attributed to the defendant's negligence, would join together, as two active forces to inflict harm. In that situation, it would be for the jury to determine whether the negligence of the defendant was a substantial contributing factor. See B & O Railroad v. Sulfur Springs, 96 Pa. 65, (1880), and the dissenting opinion of Judge Kalish, Cook v. Highland Water and Sewer Authority, 530 A.2d at 506.

In addition to the issue of general causation, there is a common question as to whether the defendant's actions or inactions were negligent, and also, whether the defendant was maintaining an abnormally dangerous instrumentality by the operation of its hydro-electric dam. It may well be that the defendant may ultimately prevail on one or more of these common questions, either on its motion for summary judgment or after trial on the merits. In any event, such a finding in this court's opinion, would greatly advance this litigation, and such common questions predominate over any question affecting only individual

members, such as, the amount of their damages and whether they took necessary steps to mitigate their damages.

It is also obvious in view of the number of claimants and the extent of the damages the prerequisite of numerousity is present. The claim of the Engles, and such other class representatives as may choose to intervene, is typical, that is, they all claim this defendant was negligent, that its negligence was the proximate cause of their harm, and that the defendant was maintaining an abnormally dangerous instrumentality.

In the absence of one trial of these class action issues, it is also clear that several hundred individual cases may have to be tried.

The court finds that the size of the class and the difficulties likely to be encountered in the management of the action as a class action as to these issues, is not significant. However the fact that individual actions might result in inconsistent verdicts, would not, in itself, dictate against individual actions, nor is there any claim that this defendant would be unable to pay all of the claims, if they proceeded as individual actions. However, as a practical matter, as demonstrated in the "Agent Orange" Litigation, those individuals who decide to proceed with individual actions may be confronted with summary judgments rendered against them, even if the class members succeed in securing some settlement.

It is true that numerous other individual actions have been commenced, but most of such actions are in Washington County, Pennsylvania, and involve the same common issues as are present in this class litigation, and persons who have filed individual actions, will of course, be

permitted to exclude themselves from this class action. Of course, if they prefer to be included they may be represented by their own counsel.

This court would gladly transfer this entire litigation to another county or to the Federal Court but it is apparent that the bulk of the claims have been and will be filed for residents and businesses located in Washington County.

Some of the claims of the individual class members are sizable, but on the other hand, there are other claims which are insufficient in amount to support separate actions. Indeed, some of these claims are arbitration size. It is obvious that several million dollars is here involved and the amount that may be recovered by individual class members, on the average, will not be so small in relation to the expense and effort of administering the action as not to justify a class action. This court finds that the class action as to limited issues, will provide a fair and efficient method for adjudication of the controversy under the criteria set forth in Rule 1708.

Plaintiffs' counsel has filed his affidavit, that he will provide sufficient funds to fairly and adequately assert and protect the interest of the class in accordance with the criteria set forth in Rule 1709, and this court finds no conflict of interest in the maintenance of the class action.

The defendant has objected to the plaintiffs' attempt to limit the class to persons or business entities who suffered property damage in the geographical area from Point Marion, Pennsylvania, to Maxwell, Pennsylvania from November 3-6, 1985.

It is true that the plaintiffs' expert, Mr. Cahill, indicated that he did not believe that persons further downstream than Maxwell, Pennsylvania, suffered any harm as

a result of the defendant's actions. Nevertheless, since discovery was not complete at the time Mr. Cahill testified, this court will, at this time include in the class, individuals or business entities in Pennsylvania who suffered such property damage, from November 3 through November 6, 1985.

**ORDER OF COURT**

AND NOW, this 3rd day of October, 1988, the motion of the plaintiffs, John H. Engle, et al., for class action certification is granted.

The class is described as follows:

All individuals or business entities who suffered property damage in Pennsylvania between November 3 and November 6, 1985, as the result of the actions of West Penn Power Company, in obstructing and/or releasing improperly flood waters from the Lake Lynn Dam and/or failing to adequately notify such individuals or entities.

Every member of the class is included unless by, December 31, 1988 the member files of record a written election to be excluded from the class. This class action shall be limited to these issues:

1. Whether the defendant, West Penn Power Company, during November 1985 was negligent in obstructing and or releasing improperly flood waters from the Lake Lynn Dam during November 3-6, 1985 and/or in failing to adequately notify the individuals or entities who suffered property damages.

2. Whether the negligent actions, if any, of the West Penn Power Company during the aforesaid period was a proximate cause of property damages suffered by the plaintiffs.

3. Whether the maintenance and operation of the hydro-electric project known as the Lake Lynn Dam, by its defendant West Penn Power Company, was an abnormally dangerous activity of the defendant, and whether the maintenance of such alleged dangerous instrumentality by the defendant Power Company was a proximate cause of any harm to the plaintiffs.

This order is conditional and before a decision on the merits, may be revoked, altered or amended for cause by the court on its own motion, or on the motion of any party.

A supplemental order with respect to the notice to be given will be entered pursuant to Pa. R.C.P. 1712. This court will meet with counsel to consider the type, content, and method of notice on Thursday, October 27, 1988 at 10:00 o'clock a.m.

/s/ SAMUEL L. RODGERS, J.

Samuel L. Rodgers, J.

## APPENDIX B

## IN THE COURT OF COMMON PLEAS OF WASHINGTON COUNTY, PENNSYLVANIA CIVIL DIVISION

JOHN H. ENGLE, WILLIAM R. ENGLE, WILLIAM C. ENGLE, t/d/b/a ENGLE'S HOLIDAY HARBOR, a Partnership and as Representative of a Class,
*Plaintiffs*

*v.*

WEST PENN POWER COMPANY, a corporation,
*Defendant.*

**No. 271 November Term, 1985 A.D.**

### ORDER OF COURT

AND NOW, this 27TH day of October, 1988, this was the time set for a conference to consider the type, content and method of notice in this class action, and also to consider any changes that might be made in this Court's Order of October 3, 1988.

After conference with counsel, the Court affirms its Order of October 3, 1988 except as follows:

The Order of October 3, 1988 described the class as all individuals or business entities who suffered property damage in Pennsylvania, and the Court has been informed that other entities besides business entities may have a claim in this matter and the Court changes the description of class by striking the word "business" so it will read, "all individuals or entities."

The Court's Order also provided that every member of the class is included unless by December 31, 1988 the member files of record a written election to be excluded from the class. After considering the proposed schedule of notice in newspapers in the appropriate area, it appears that the last notice will not appear probably until the week of December 5, 1988, and this may not allow sufficient time for every member of the class who wishes to opt out to exclude himself. Accordingly, the Order of October 3, 1988 is amended to read, "Every member of the class is included unless by January 31, 1989, the member files of record a written election to be excluded from the class."

James Zeszutek, Esquire, has been designated at this time, until further Order of the Court, to serve as counsel for the class and he has presented a proposed notice of class action which the Court will consider and it has been made available to the defendant, and the Court has asked the parties, within one (1) week to confer and then respond to the Court as to the contents and type and method of notice. The parties at the present time appear to agree that the notice be given by newspaper of general circulation in the five (5) county area of Allegheny, Westmoreland, Fayette, Greene and Washington Counties. At the end of that one (1) week period, the Court will issue a supplementary Order specifying the content, type and method of notice, and providing that any member of the class may, within ten (10) days, file objections which the Court will consider. In view of this time table, the Court has also opened discovery period in this class action and extends the discovery period to April 1, 1989, at which time all discovery will terminate unless further extended by Order of Court.

Accordingly, the arguments on the pending motions for summary judgments and briefs will be rescheduled after the close of the discovery period, at which time the Court will also schedule a pre-trial conference.

By the Court,

/s/ SAMUEL L. ROGERS, J.
Samuel L. Rodgers, J.